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ABSTRACT

The authors offer proposals for studies of human behavior in the courtroom, with respect to communications interaction among jurors and source credibility of attorneys. They refer to innovations in videotaping procedures, which make it possible to examine communications principles and dynamics in the courtroom situation. The first proposed study will be on the influence of the attorney on the decision-making process of the jury. The authors present an outline of a study that seeks to determine: (1) the dimensions of source credibility of attorneys and how they are affected by their adversary relationships; and (2) the influence of the attorney credibility on the behavior of jurists. The second proposed study deals with analysis of the jury in terms of small group theory and research. They would test their hypothesis that a six-man jury would be superior to the traditional jury of twelve, in terms of maximum efficiency. They also hypothesize that juries' decision-making performances would be improved by instruction in small group behavior and the discussion process. (RN)

# Studying Trial Variables Through Videotaped Trials

H. Thomas Hurt and Malthon M. Anapol

Professor Harry Kalven of the University of Chicago School of Law and a leader in the development of social science studies of legal problems, co-author of the trailblazing volume, The American Jury, wrote in 1968

> Yet despite these good tidings and despite its shrewdness about the differences between law and science, my point put bluntly is that the law on the whole remains today gratuitously unscientific. Put less bluntly, we in the legal world need some literacy as to scientific method and as to the scientific idiom of exposition. Most important we need to develop some taste, and I use the word advisedly, in scientific inquiry. We are fond of talking about getting "the feel" of a rule of law; we need also to get "a feel" for empirical inquiry in law.

Today, some four years later, Professor Kalven's comments are still valid and still current. One additional statement from Professor Kalven will help in setting the framework for our proposal.

> The trial of an issue of fact is not simply a scientific exercise but a practical affair conducted with stringent deadlines and without the scientist's perogative of suspending judgment until further evidence is in. A trial is an exercise in the management of doubt, for which the law has rules about burden of proof that science does not need.

Kalven's views are far in advance of most legal scholars and practicing lawyers. Most lawyers simply accept a body of assertions and customs relating to human behavior in the courtroom which have only recently begun to be scrutinized by the empirical methodologies of the social sciences.

In our study we propose to examine two major groups of trial variables, they can be subsumed under the headings of credibility variables and jury variables. However, we should first like to examine the current state of the art.

The current body of legal procedures and philosophy, particularly those of the United States, have origins which extend far back in history to the early Roman Empire (Anapol, 1970). Given these historical antecedents, and the traditional

forms of courtroom ethics, Twentieth Century legal philosophy contains a body of assertions relating to human behavior in the courtroom which have only recently begun to be scrutinized by the empirical methodologies of the social sciences. For example: it has long been believed that attorneys have little or no influence with juries beyond the successful transmission of information about the case being tried. Yet empirical research in communication has demonstrated that it is the credibility, or prestige, of the source which frequently accounts for the most significant influence in the persuasive process (Hovland and Weiss, 1953; Greenberg and Miller, 1966). In addition, the United States has long made use of the twelve member jury for rendering guilty--not guilty decisions. Communication research has demonstrated, on the other hand, that the maximal size of decision making groups is from five to seven members (Guetzkow and Collins, 1966).

These are only two of many examples which illustrate the lack of interaction between legal training and philosophy and scientific data. Attempts at some conjunction between these two have largely been limited to "field studies" investigating the criminal justice system outside the courtroom environment. Actual studies of courtroom behavior, particularly controlled investigations of the decision making process in juries, have met with threats and attempts at prosecution of the investigators (Kalven and Zeisel, 1966).

Recently, however, innovations in the use of video taping procedures (Gunther, 1972) in actual trials have made possible controlled experimentation of certain selected variables in trials-by-jury. Of all of the social sciences, these innovations have been of particular interest to communication scholars. The

reasons for this interest are twofold: 1) the outcome of any trial is primarily a function of the communication dynamics imposed on the situation by legal procedures and ethics (Anapol, 1972). The testimony of witnesses, the structure of legal arguments by attorneys, and the behavior of jurists are all variables which bear strong relationships to the central concerns of communication researchers; 2) many of the assertions about courtroom behavior are statements about communication principles (the credibility of witnesses and attorneys', the presentation of information to jurists, the usefulness of certain channels of information) which have not been empirically investigated in actual trial situations. Consequently, the major thrust of this research will be concerned with the investigation of the "ecological validity" of these assertions to the legal process using acceptable methods of controlled empirical research in courtroom environments. The goal of this research will be not only to begin the development of a theoretical body of knowledge, but also to provide to the legal profession scientific data which will be useful in making a reality of the maxim of "equal justice for all under law."

## Source Credibility

The effects of source credibility--prestige suggestion--on persuasion and attitude change have been well documented (Anderson and Clevenger, 1963). Hovland and Weiss (1953), for example, found that a highly credible source (trustworthy) was more effective than a low credible source in inducing opinion change. In general, studies utilizing credibility as an independent variable have tended to replicate these results (Hovland, Janis, and Kelley, 1953). Yet in all of these studies, credibility was assumed to have been a unidimensional variable (trustworthiness) induced by certain elaborate introductions of the source by the experimenter. Hovland, Janis, and Kelley also make reference to an "expertness" dimension of credibility, but the nature of their research designs make it difficult to separate trustworthiness effects from expertness effects.

Unfortunately, however, much of this research assumes that credibility has a priority been defined by the experimenter, or that it was believed to have been operating to effect subjects behavior as determined by some type of post hoc analysis. Sherif, Sherif, and Nebergall (1965) noted, however, that "credibility and like terms do not represent attributes of communicators; they represent judgments by the listeners... (pp. 201-202)." Credibility is not a function of the judgment of the experimenter.

Judgments of source credibility have normally been defined (when used as a dependent variable) by subjects' responses to the evaluative scales of the semantic differential developed by Osgood (1957). This technique is not unlike having the experimenter define source credibility. In a controlled, empirical investigation of the dimensions of credibility, Berlo, Lemert, and Mertz (1969) had subjects develop their own semantic differential-type scales to measure credibility. Subsequent factor-analyses of the responses to these scales isolated three factors of credibility. These were labelled "safety", "competence," and "dynamism". Responses to these three factors, taken together, constitute a communicator's credibility "profile" as perceived by his listeners, and is strongly related to the impact that any given message will have.

Subsequent factor-analytic studies have yielded much the same results as those reported by Berlo, Lemert, and Mertz. Whitehead (1967) used different adjective pairs as semantic differential-type scales and found substantially the same three factors of credibility affecting attitude change. Although Bowers and Phillips (1967) reported that "trustworthiness" and "competence" were the two most generalizable dimensions of credibility, a more recent study by McCroskey (1971) indicates that source credibility is a function of the interaction between type of receiver

and type of source (e.g., peer, public figure, spouse, or organization), and the resulting factor structures of credibility are largely dependent upon these sociological variables. Nevertheless, most of the research since Berlo, Lemert, and Mertz's original study has demonstrated that source credibility is a significant variable in communicative interactions relating to such factors as vocal delivery (Hewgill and Miller, 1966) and the reduction of intrapersonal dissonance through self-persuasion (Greenberg and Miller, 1966). Any analysis of source credibility, then, should not depend upon a simple evaluation of attitudes toward sources, but should study the interaction effects of the obtained dimensions of credibility. Such an analysis helps to make predictions of the effects of communications more precise and facilitates the making of recommendations for the subsequent manipulation of source credibility in the persuasive process.

In the courtroom, the attorney is the single most important source of communication. Relatively little attention has been paid, however, to the influence of the attorney on the decision making process of the jury. An earlier study by Weld and Danzig (1940) indicated that the prestige of the counsel functioned as an intervening variable in the decision making process, although their data is somewhat suspect due to the fact that the researchers failed to adequately define counsel credibility. Contrary evidence was supplied by Kalven and Zeisel (1966) who found that in isolated instances the counsel had relatively little impact on the outcome of the trial. Kaplan (1967) has pointed out, however, that these data ought not to be taken seriously due to the mitigating effects of a limited data base and difficulties with interpretations of questions about counsel.

Given the fact that there still remains an obvious paucity of information about the influence of the credibility of attorneys, and that what information does exist is suspect due to either inappropriate techniques of data collection or the fact that it runs contrary to long and well established principles of communication, the first portion of this study will be devoted to answering the following set of questions.

$QI_a$ What are the dimensions of source credibility of courtroom lawyers, and how are these dimensions affected by the adversary relationship of opposing attorneys (e.g., prosecuting attorney vs. counsel for defense)?

$QI_b$ What is the influence of attorney credibility on the decision-making behavior of jurists?

## METHOD

### Subjects

Subjects will consist of a group of persons representative of those who serve on juries. Attempts will be made to obtain appropriate percentages of males and females, and various age and occupational groups.

### Stimuli and Procedures

In order to answer $QI_a$, all subjects will be given questionnaire booklets containing the following items: 1) A series of semantic differential-type scales bounded by bi-polar adjective pairs for measuring credibility developed by Hurt and Bostrom (1970) and McCroskey (1971). To assess the impact of the adversary relationship of attorneys, subjects will be asked to evaluate the credibility of such sources as "PROSECUTING ATTORNEY", "PUBLIC DEFENDER", and the like. In addition, subjects will also respond to a set of "Communicative Interaction" scales to determine the relative impact of each of the obtained dimensions of credibility on other kinds of communicative behavior.

Data Analysis

Following collection of the data, credibility responses will be submitted to principle axis and varimax rotations to determine the dimensions of credibility for each of the sources. In order to load on any factor, each specific scale must have a loading of .60 on the primary factor, and no more than .40 on any other factor.

Once the credibility factors have been determined for each source, the factors will be independently correlated to each of the interaction scales. These correlations will provide regression models useful for predicting subsequent effects of credibility in the actual courtroom settings.

In examining research in trial variables two basic problems become apparent. The researcher trained in law tends to avoid ground rules of the social sciences and the social science researcher tends to ignore the realities of the legal system. Let us look at a few concrete examples.

Without question Kalven and Zeisel and their associates Simon, Broeder, et.al. have made the most significant contributions from the legal side. But in Erlanger's words "Any further research will have to face the problem of collection of data. Jury bugging is, of course, not legal (Kalven & Zeisel, 1966)."

Kalven and Zeisel resorted to interviewing jurors after the trial was over, they also surveyed judges on their experiences with juries. From this kind of data they extrapolated most of the data in The American Jury.

Strodtbeck and Simon who were sociologists working with the Chicago Jury project did go a step further and produce audio tape recordings which were listened to by juries drawn from "real" jury panels, sitting in a courtroom, presided over by a real judge. Erlanger calls this "probably a good simulation of the real thing" but suggests the use of video tape.

It is our contention that the contradictions between communication research and past legal research result from the research designs which have been employed. When Kalven and Zeisel asked jurors if they had been influenced by the "credibility" of the opposing attorneys, they were by their choice of method strongly influencing the outcome of the study.

Psychologists have made a number of studies of the trial situation, but they have made their own peculiar errors of research design. For an example I should like to examine the most recently published study available, it appears in the Fall (November) 1972 issue of Law and Society Review, it is written by Kalman J. Kaplan and Roger I. Simon. It is representative of much of the legal communication research done by psychologists.

The article bears an impressive title: "Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising From the 'Algiers Motel' Trial". The authors state their research method as follows:

> Three hundred and seven white male and female undergraduates at Wayne State University served as simulated jurors. They were each presented with a vignette describing a hypothetical traffic fatality and asked to make a judgment as to the guilt or innocence of the driver-defendant. Three key features of this vignette were independently varied across subjects according to rules of random assignment. They were: (1) race of the victim, (2) strength of the evidence against the defendant, and (3) the actual choice structure (i.e., the options) the subject encountered in arriving at his verdict.

This study produced a number of findings: race of the victim seems to have very little, if any effect, on the verdict; evidence strength affects the verdict; and a four-choice structure produces a lesser percentage of innocent decisions than a two-choice structure.

The last paragraph of the article contains a few remarks which I find worth quoting:

> Ours, though a simulation, remains a laboratory study. It would have been impossible to manipulate these variables in an actual jury trial. As with any laboratory study which attempts to extrapolate to the "world beyond" a degree of caution must be exercised. In studies of this kind it seems especially incumbent for us researchers to make our simulations as lifelike as possible. Perhaps films, television, and guerilla theatre would afford better simulations than the paper-and-pencil stimuli used in the present study.

We take at least four serious objections to the procedure employed in this study. (1) A jury is a group of twelve persons who arrive at verdict. Everything we know about the jury suggests that interaction takes place. Jurymen do not function as single isolated individuals; all verdicts are collective efforts. (2) Jurymen do not receive trial information as a neatly edited vignette. They receive it in bits and pieces through witnesses, exhibits, and attorneys. There is also input from a judge. In part at least the verdict of the jury reflects their perception of the information sources and the credibility of the

sources. While Kalven and Zeisel suggested that the attorney was not a significant variable, they agreed that the credibility of the witnesses and the defendant was a major variable in determining trial outcome. (3) University students are excluded from the jury simply because they are attending school; many are underage for jury service. They simply do not represent a typical jury panel. (4) Any jury trying a black defendant from which black jurors were systematically excluded would not be acceptable in light of recent civil rights legislation and court decisions subsequent to that legislation.

We are inclined to consider the last sentence the most acceptable one in the entire study. Let us turn now to the jury variables which we plan to investigate.

The Jury

Brought to England by the Norman conquerors the jury has been part of Anglo-American legal procedure and tradition for almost a millenium (Erlanger 1971). While the size and role of the jury did vary somewhat in its early stages of use, we have long since settled down to a jury of twelve of the defendant's peers who are charged with deciding questions of fact, while the judges decide questions of law (Kalven and Zeisel, 1966).

There have been numerous studies and investigations of the competance of the jury (Erlanger, 1971; Kalven and Zeisel, 1966) as well as its efficiency, utility, and approach to the task of fact finding. These studies have been done by lawyers (Kalven and Zeisel, 1966; James, 1951), by sociologists (Simon, 1968; Erlanger, 1970; Strodbeck, 1962), and on a few occasions by psychologists (Hovland, Kelly, and Janis, 1957).

Meanwhile a literature of small group theory and research was being developed by social psychologists like Cartwright and Zander (1967), and Guetzkow and Collins (1966) as well as communication scholars such as Cathcart and Samovar (1970), Fest and Harnack (1966), Stattler and Miller (1967) and Barnlund (1968). Unfortunately, none of these groups ever seemed to be familiar with the work of the others although all were interrelated.

Since clearly a jury is a small group with the specific task of rendering a decision in a trial at law, it should be studied from all of the previously mentioned facets. We propose to bring together the concepts of small group theory and legal procedure and investigate their validity in the context of the jury.

## Dependent Variables

The dependent variables in this study will be: 1) the ability of the jury to reach the decision agreed upon as correct by the actual judge and jury, and by our consultants, who will be experienced area trial attorneys; 2) reaching a decision within a specified time period rather than becoming a hung jury which we will define as a jury unable to agree upon a decision; and, 3) the quality of the jury deliberation process as evaluated by trained observers using Bales' criteria for effectiveness of discussion.

## Independent Variables

We shall study two constructs of small group theory, group size and the process of decision making. Small group research has consistently reported that optimum size for a decision making group was five to seven individuals (Errickson and Phillips, 1971). By tradition juries have been twelve in number, but recently the

U. S. Supreme Court has ruled that juries of less than twelve are consistent with the constitutional guarantee of the right to a trial by jury. Hence, investigations relating to maximally efficient jury size have real importance and much potential usefulness. Should the six man jury prove to be equal to or better than the traditional twelve man jury, the finding would have a wide range of significance.

This study will be designed to test the hypothesis that the six man jury will be superior to the usual twelve man unit. Preliminary research on a limited basis with legal materials in a course in small group communication has indicated that the small sized unit may offer advantages.

Small group researchers have consistently reported that the utilization of a pattern of deliberation will lead to improved accomplishment of the group task (Bayless, 1970; Larson, 1971) and that the use of a discussion process is of greater significance than the choice of any specific process. Hence, a second hypothesis in this study will be that juries will improve their performance of the task when given instruction in a decision making process which they will then utilize in their fact finding deliberations.

The method to be employed will be the production of videotaped trials based on the transcripts of actual court trials which have been decided in the Delaware courts. These video tape-recorded trials will then be utilized under varying conditions to gather data with which to gest the hypothesis. In addition, observations and recordings will be made of the jurys as they deliberate and reach verdicts. Such observations of real jurys are not legal. Erlanger, (1971); Strodtbeck (1962), and Simon (1967) all recommended the use of video taped trials, but to the best of our knowledge no research has been published to date using the method of the video taped trial.

In review of the methodology trials will be videotaped using experienced area trial lawyers as consultants to insure validity of procedure and substance. These taped trials will then be shown to jurys. The jurys will be drawn from persons eligible to serve on jurys, or people who have within the past two years actually served on jurys. The data will then be utilized to determine the validity of the hypotheses being tested.

We expect to utilize trials that can be presented on videotape in a limited time period of about three hours, since the usual delays and recesses will be eliminated this should not be difficult. One-half of the jurys will be given instruction in decision making which will be based upon a consensus of the material in current group discussion texts. The other half of the jurys utilized will receive no instruction. In each group, instructed and uninstructed jurys, half will number six jurors and half twelve jurors. The assignment of individuals and jurys will be made on a random basis.

The data will be analyzed to compare the performance of each type of jury size and instruction status with each of the other possible combinations. We will be concerned with both the efficiency of the jury in accomplishing its task and the quality of its interaction and deliberation.